SUPREME COURT, U. S.
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No. 307

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

JAMES EDMUND BRADY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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Petitioner pursued his remedy before only one Board, the Army Board for the Correction of Military Records. The case invited reopening, and, in fact, was reopened by the ABCMR. The United States, in its Memorandum In Opposition to Petitioner's Petition for a Writ of Certiorari to the United States Court of Claims, refers in its Appendix to Section VI Paragraph 20 of Army Regulations No. 15-185

dated 8 January 1962. Paragraph 20 of said Regulation provides the following:

> "20. Action by Secretary of the Army. The record of proceedings of the Board will be forwarded to the Secretary of the Army who will direct such action in each case as he determines to be appropriate, which may include the return of the record to the Board for further consideration when deemed necessary."

Petitioner's case was before the Secretary of the Army for review, for the first time, until the final action by the Secretary of the Army, on February 14, 1962. Clearly, the action was not final until the day on which it was declared to be final by the Secretary of the Army. Petitioner filed before the United States Court of Claims his petition for disability retirement on November 25, 1966, well within the required six year period.

The Memorandum in Opposition filed before this Court by the United States would erroneously lead the Court to believe that review by the Secretary of the Army and

consideration of his final action is optional with the Board, notwithstanding that this case was reopened and a hearing subsequently granted. If such be the case, the Board is permitted to abort the function of the Secretary of the Army by the transparent expedient of refusing to grant the applicant a hearing, and making itself both judge and jury as to the adequacy of petitioner's presentation of his case in order to obtain a hearing.

It was just this position from which the Board retreated when it agreed to grant the petitioner a hearing conditioned upon the dismissal of his pending application for a Writ of Mandamus for a hearing before the United States District Court for the District of Columbia.

Thereafter, petitioner did in fact submit overwhelming evidence of his hypertensive cardiovascular disease which finds him 100 percent disabled at this time.

Following the final decision of the Secretary of the Army on February 14, 1962 denying petitioner's application before the Secretary for disability retirement, is it proper for the United States to

compound that arbitrary action with a second and more destructive action by making such finality of decision retroactive to an earlier date so as to deny petitioner any further course of action, notwithstanding that petitioner merely awaited the final decision of the Secretary of the Army?

In short, the United States appears to be contending that if petitioner had been successful before the Secretary of the Army, the decision would be final on that date. However, since petitioner was in fact not successful in his application before the Secretary, then the United States appears to be saying that the final decision of the Secretary is meaningless.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Report of the United States Court of Claims for the Court years ending as shown.

Cases Other than Class Cases
(Service Pay)

Year	Pending Plaintiff	Filed Plaintiff	Disposed Plaintiff	Pending Sept.30 of yr.shown Plaintiff
1966	90	36	35	91
1967	91	35	34	92
1968	92	22	42	72